No. 14553

United States Court of Appeals

NINTH CIRCUIT

NEVADA-PACIFIC DEVELOPMENT CORPORATION, V. E. WILLEY, G. F. STURDEVANT, C. FITCH, L. A. PRISK, BILL GREGORY, D. HULBERT and GEORGE N. TAUSAN, APPELLANTS,

— VS. —

HARLEY W. GUSTIN, APPELLEE

Appeal from the United States District Court

For the District of Nevada

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

While the appellants thoroughly outline the pleadings in the matter they avoid stating the factual premise of the judgment appealed from. Appellee deems it necessary to place before the court that which appellants seemingly have avoided. (References hereafter made are to the pages of the printed Transcript of Record).

Three sets of claims were originally involved in the action, the Ray Ricketts 1 to 4 inclusive purportedly located by Bill Gregory in 1947, the Kay Coopers 1 to 11 inclusive located by R. C. Peterson and Carl Harry Cooper commencing in June 1948 through September 30, 1949, and finally the Ray Ricketts 1 to 4 inclusive located by Prisk and Hulbert in February 1951. The trial court found the 1947 Ray Ricketts locations to be void for failure to file certificates of locations within the statutory time (Tr. 49-50), and found the Kay Coopers 1 to 5 inclusive to be void for the same reason (Tr. 47-48). Appellants apparently contend that there is no evidence in the record upon which the court could find a discovery of ore in place on Kay Coopers 6, 8, 9 and 10. There is no challenge on this appeal as to the finding of the trial court that the 1947 Ray Ricketts locations are void and the locations of the Kay Coopers 1 through 5 are likewise void.

There is no contention upon the part of the appellants that the Kay Cooper claims 6, 8, 9 and 10 were improperly marked and monumented. The Kay Coopers and the 1951 Ray Ricketts, while not similar as to claim lines, cover substantially the same ground, the four Ray Ricketts being within the area covered by the eleven Kay Coopers and conflict in area as set forth by appellants on page 7 of their brief. Both sets of claims are alleged to be based upon a discovery of tungsten ore and both claimants are of necessity claiming the same lode or vein. The record discloses that Peterson and Cooper in 1948 and 1949 located the Kay Coopers on ground which was open to location, which fact the trial court found to be true (Tr. 47), and from which finding appellants do not appeal.

THE QUESTIONS INVOLVED

There is but one primary question, namely: whether there is sufficient evidence in the record showing a discovery of mineral in place on the Kay Cooper claims numbered 6, 8, 9 and 10 in support of the affirmative findings of the trial court in that regard.

We will first point to the portions of the record which sustain the trial court's findings of a valid discovery on those of the Kay Cooper claims that are in issue, and we will then attempt to counter the arguments made by appellants.

ARGUMENT

(a) *Evidence of Discovery* on *the Kay Coopers.*

R. C. Peterson, Carl Harry Cooper and Albert Brown testified in detail with regard to the discoveries and discovery work on the Kay Cooper claims, the testimony being that they lamped the area with fluorescent lamps where they found tungsten outcroppings, marked such findings and on the next day returned to the ground, erected monuments and commenced discovery work (Tr. 121, 122, 181, 182). The discovery work on each of the claims consisted of a trench in excess of 240 cubic feet (Tr. 123, 129, 182). The locators testified that as to each claim they found mineral in place. On direct examination, on the question of discovery of ore, witness Cooper testified:

> "Q. Now referring to the claims Nos. 6 to 11, did you find ore on those?
>
> A. We found ore, yes, sir.

Q. And what was the nature of that?

A. It was tungsten, scheelite.

Q. And where did you find it?

A. In the location cuts." (Tr. 129)

On direct examination the witness R. C. Peterson corroborated the discoveries made on the claims:

"Q. Can you state as to Kay Cooper No. 1 whether you found tungsten in the discovery cut?

A. We found scheelite in the discovery cut.

Q. As to the rest of Kay Cooper Nos. 2 to 5, did you find tungsten?

A. We found mineral in all of them.

Q. Now calling your attention to Kay Cooper Nos. 6 to 11, did you participate in the discovery work on each of those claims?

A. I did." (Tr. 184-185).

Appellants point to the testimony of R. C. Peterson on cross examination to dilute the fact of discovery. Mr. Peterson testified that he was a miner, engaged in that occupation since 1918 and had been prospecting for all kinds of minerals since that time (Tr. 180-181). Appellants take out of context Mr. Peterson's testimony on cross examination in an effort to tie a typical "hard rock miner" to the refinement of a technical definition capable only of a schooled engineer. Mr. Peterson testified as follows:

"Q. Now will you say, from your own knowledge, that in each of the 11 holes a lode or vein in place was exposed?

A. I couldn't make a statement of that kind because I am not an engineer. There was mineral present in each hole.

Q. You know the difference between placer and rock in place, do you not?

A. I know that, yes.

Q. All right. Will you say then that in each one of the 11 holes there was rock in place and mineral in that rock?

A. I couldn't state that, not at the present time.

The Court: Is there any question as to whether or not there was discovery of mineral?

Mr. Ross: That is correct.

A. There was a discovery of mineral on all claims." (Tr. 190-191).

The discoveries and the discovery work accomplished by the locators was further verified and corroborated by witness Victor E. Peterson. On direct examination, in response to a question by the court, Mr. Peterson, an engineer and geologist, testified:

"The Court: That would apply to all of the —

A. That would not apply to all of them. Of course, in the case of No. 8, there is definite showing on the rock, on the surface. In the case of No. 2 that is also true. On No. 4 it is pretty definitely in place. On No. 6 it is very definitely in place. In the claim which lies to the south, in what might be called reconsolidated matter, that is open to question." (Tr. 212-213).

The above answer was given after Mr. Peterson had testified that they found mineral in place on all the claims (Tr. 211). In explanation of his answer Mr. Peterson attempted to give a technical definition of mineral in place but never departed from his statement that there was a discovery of scheelite in place on all of the claims.

On rebuttal the witness Lee D. Dougan, an engineer, confirmed, without contradiction in the record, that the claimants of both groups of claims were locating the same vein or lode.

"Q. Now I will ask you, Mr. Dougan, in your opinion is the vein exposed by the workings by the Nevada-Pacific the same vein which you testified you saw in the workings of the Kay Cooper people that you supervised, Trenches A, B, —

A. There is no question about it. It is a continuation. In fact, our B trench is right over their workings. That is just a short trench. We had just a little showing there and as they went down they opened up their ore and it is the same trench that goes in the south face of the A trench.

Q. And that is on No. — A. No. 8.

Q. And is that the same on No. 2?

A. I think that is the same on No. 2.

Q. Now other than the workings on the Nevada-Pacific that you have described on No. 2 and No. 8, are there any other substantial workings of the Nevada-Pacific on Kay Cooper claims?

A. No." (Tr. 398-399).

In addition to the discovery work done by the locators the witness J. L. Dougan testified that he expended some $20,000.00 in connection with the property between September 8, 1949 and the early part of April 1950, which expenditures included $10,000.00 paid to the locators for options and the immediate right of occupancy and possession of the claims (Tr. 88). He further testified that by the use of a radiant lamp he observed tungsten and the occurrence of mineralization (Tr. 83, 89).

Witness Federhoff, a driller for Boyle Bros. Drilling Company, under contract with J. L. Dougan, drilled from 700 to 800 feet of drill holes during the months of February and March 1950 (Tr. 76-77), which drill holes are shown and recorded on Exhibit 18.

The evidence required to prove a discovery is clearly expressed in *Lindley on Mines,* Vol. 2, 3rd Ed. at page 767:

> "Slight evidence on the existence of a lode might satisfy the demands of the law upon the question of discovery as the basis of location, when clear and convincing proof would be required to establish the existence of a 'known vein' within a prior townsite or placer patent.
>
> The supreme court of the United States clearly recognizes the distinction between the two classes of cases, by intimating that the land officers might, on a *prima facie* case, decide the right of an applicant to a vein or lode and issue a patent therefor, upon proof less conclusive than would be required where a conflict arises between a prior placer and subsequent lode patent."

This court, consistent with the fundamental rule, has repeatedly held that where there is substantial evidence to support the version chosen by the trial court of the testimony, and the permissible inference from documentary evidence and admitted facts, the requirements of the Federal Rules are met. See *Gamewell Co.* v. *City of Phoenix* (C.C.A. 9th), 216 F. 2d 928.

(b) *The Conflict of Testimony between the Parties.*

The interest of appellants in the property came to light on June 29, 1950 when defendant Hulbert demanded of Cooper one-half of a payment of $17,500.00 which he

thought was to be paid to Cooper under the options of Mr. J. L. Dougan (Tr. 130-131). Shortly thereafter the appellants, by trespass and against the demands of Cooper, occupied the property (Tr. 138). The appellants thereafter remained on the ground contrary to all right and, on that basis, located the Ray Ricketts 1 to 4 in February of 1951. The 1951 locations were relocations of the original Ray Ricketts claims with the numerical designation the only change.

The gist of appellants' contention of a lack of discovery on the Kay Cooper claims is stated on page 48 of their brief:

> "In the case at bar, there has been a misconception by the trial Court of the imperative essentials of a valid discovery under both Federal and State mining laws."

Succinctly stated, counsel for the appellants mean the trial judge believed the wrong witnesses. It is fundamental that the trial court is free to choose between alternative versions of testimony and weigh more heavily for one party than the other. *Gamewell Co. v. City of Phoenix,* supra; *U. S. v. Yellow Cab,* 338 U. S. 338, 70 S. Ct. 177, 94 L. ed 150.

The appellants' witnesses, all of whom were directly interested in the outcome of the litigation, testified with a certainty rarely found that they had examined the workings of the Kay Cooper claimant and failed to find anything but sand, in spite of the fact that they were claiming the same ground and the same ore by reason of alleged valid discoveries made on the locations of the Ray Ricketts claims in 1951. The extreme nature of the proof offered to discredit the Kay Cooper locations is illustrated

by the testimony of appellants' witness Walton, who testified on direct examination that during the course of the trial he went to the property and probed the Kay Cooper locations with steel drills three-quarters of an inch in diameter, and while he stated that he did not find hard rock he did admit that the drill hit tight spots and had to be removed with pipe wrenches (Tr. 388-390). This testimony was five years after the location work done by the Kay Cooper claimant and was in an area of high erosion and drifting of sands which deposited considerable loose material in the cuts and trenches made by the Kay Cooper claimant. Typical of the extreme nature of the appellants' testimony is illustrated by the witness Hulbert, who testified as follows:

> "Q. Now as a result of that examination, will you state whether or not there was a lode in place in the discovery workings on any of those claims, Kay Cooper 8, 9, 10 and 11?
>
> A. No, absolutely no." (Tr. 311).

The question of credibility was the principal issue before the trial court. Appellants' authorities as to what constitutes mineral in place are agreed to by appellee. The real point is not a refinement of definition as to what constitutes a discovery of mineral in place but whether or not a genuine discovery has been made. In *Lindley on Mines,* Vol. 2, 3rd Ed., page 772, the author effectively states this proposition:

> "While the courts may be unable to define with sufficient accuracy for all purposes what is necessary to constitute a discovery, they may have no difficulty in discriminating between the genuine and the counterfeit, the real and the sham."

Appellants on page 46 of their brief point to the relinquishment of the options by Mr. Dougan as substantiation that ore was not discovered by the Kay Cooper locators. They also point to a failure to prove assay reports as showing a failure to discover ore. It is doubtful that appellants contend that quality or quantity of the mineralization has any importance in the making of a valid discovery.

Fox vs. Myers, 29 Nev. 169, 86 P. 793:

> " ' * * * The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes (U. S. Comp. St. 1901, p. 1424) has been decided by many courts. All the authorities cited by appellants are referred to in Book v. Mining Co. (C. C.) 58 Fed. 106, 121. The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode.' "

It must be kept in mind that in the instant case the claimants to the two groups of claims are both claiming under lode locations based upon a discovery of tungsten ore and claiming the same lodes and veins. It is well

established that in such a case the courts have liberally construed the requirements of discovery. *Lindley on Mines,* Vol. 2, 3rd Ed., page 766:

> "The fact is, that there is a substantial difference in the object and policy of the law between the cases where the determination of the question as to what constitutes the discovery of a vein, or lode, between different claimants of the same lode under section twenty-three hundred and twenty of the Revised Statutes, on the one hand, and a 'lode known to exist' within the limits of a placer claim at the time the application is made for a patent therefor under section twenty-three hundred and thirty-three, on the other."

In such a case as presented here the Ray Ricketts claimants are re-locators and not original discoverers, and in a contest between the junior and senior locators the courts do not examine the evidence of the senior discovery with very great strictness. *Ambergris Mining Co. v. Day,* 12 Idaho 108, 85 P. 109:

> "Where one miner has discovered what he considers mineral indications and deposits, and has followed up that discovery by staking the claim and doing the necessary location work, and another miner comes along and makes a discovery, and locates a part or all of the same ground covered by the former location, and thereupon goes into court to contest the senior location, and in order to sustain that contest shows that the ground does in fact contain valuable mineral deposits, as contemplated by section 2320 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1424), and at the same time contends that the senior locator had not made a mineral discovery, the courts will not examine the evidence of the senior discovery with very great strictness."

In determining whether findings of fact are clearly erroneous the reviewing court will consider the evidence and such reasonable inferences as may be drawn therefrom in the light most favorable to appellee, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Wheeler v. Holland,* (C.C.A. 5th), 218 F. 2d 482.

CONCLUSION

We have pointed to a sufficient portion of the record to demonstrate, we believe, that the learned trial Judge did not misconceive the essentials of discovery to support a valid lode mining claim under the laws of the United States and of the State of Nevada. Enough has been said to demonstrate that the findings are supported by the evidence. The legal and factual premise of a valid location of the Kay Cooper lode mining claims 6, 8, 9 and 10 finds ample support in the proceedings and actually there is nothing else to be said of appellants' appeal, as by all of the authorities the findings of the lower court will not, therefore, be disregarded.

The judgment appealed from should be affirmed.

Respectfully submitted,

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